84-794

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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1984

MID-AMERICA NATIONAL BANK OF CHICAGO, not personally but as Trustee pursuant to a Trust Agreement dated May 1, 1981 and known as Trust Number 1575, *et al.*,

Petitioners,

v.

FIRST SAVINGS AND LOAN ASSOCIATION OF SOUTH HOLLAND, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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NOVEMBER 12, 1984

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Question Presented For Review

Whether a cause of action is to be implied in favor of uninsured flood victims against banks and savings and loan associations under either the mandatory flood insurance purchase statute, 42 U.S.C. Section 4012a(b), or the mandatory flood hazard notice statute, 42 U.S.C. Section 4104a.

Parties In The Courts Below

A list of all parties to the proceeding in the Court of Appeals and the District Court is set forth in the footnote.[1]

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[1] The plaintiffs in the courts below and petitioners in this Court are listed as follows:
Mid-America National Bank Of Chicago, not personally but as Trustee pursuant to a Trust Agreement dated May 1, 1981 and known as Trust Number 1575, Earl Berke and Mary A. Berke, James E. Wittenmeyer and E. Joan Wittenmeyer, Richard D. Smith and Katherine M. Smith, John Lucas and Junellen Lucas, and Russell R. Burton and Lucille Burton, individually and on behalf of a class of persons similarly situated.

The defendants in the courts below and respondents in this Court are listed as follows:
First Savings And Loan Association Of South Holland, Suburban Federal Savings And Loan Association, Joliet Federal Savings & Loan Association, A. J. Smith Federal Savings & Loan Association, Unity Savings Association, Gary National Bank, First National Bank Of Lansing, First National Bank In Dolton, First National Bank Of Joliet, First National Bank In Harvey, Union National Bank And Trust Co. Of Joliet, New Lenox State Bank, First State Bank Of Calumet City, South Holland Trust & Savings Bank, Riverdale Bank, First Federal Savings & Loan Association Of Chicago, Hemlock Federal Savings & Loan, Prarie Federal Savings & Loan Association, Public Federal Savings & Loan Of Calumet City, Calumet Federal Savings & Loan Association, Lansing Federal Savings & Loan, Talman Home Federal Savings & Loan Of Illinois, First Federal Savings & Loan Association Of Lansing, Dolton-Riverdale Savings & Loan Association, Crawford Savings & Loan Association, Home Savings & Loan Of Joliet and Land Of Lincoln Savings & Loan,

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v.

FIRST SAVINGS AND LOAN ASSOCIATION OF SOUTH HOLLAND, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 15, 1984.

Opinions Below

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 737 F. 2d 638

(7th Cir. 1984). The opinion of the United States District Court for the Northern District of Illinois is not reported. Both opinions appear in the Appendix hereto.

Jurisdiction

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 15, 1984. On September 11, 1984, Justice Stevens granted an extension of time to November 12, 1984 within which to petition for certiorari. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

Statutory Provisions Involved

The statutory provisions involved herein, 42 U.S.C. Section 4012a(b) and 42 U.S.C. Section 4104a, are set forth in full in the Appendix.

Statement Of The Case

This case arises under two specific provisions of the federal flood insurance laws: 42 U.S.C. Section 4104a and 42 U.S.C. Section 4012a(b). 42 U.S.C. Section 4104a is a notice statute. It requires federally regulated lending institutions to give advance written notice to their borrowers that the property being acquired by the borrower is located in a federally designated flood hazard area and that federally subsidized flood insurance protection is available. 42 U.S.C. Section 4012a(b) is an insurance purchase statute. It requires federally regulated lending institutions to condition the issuance of a loan upon the purchase of flood insurance by borrowers acquiring property located in a flood hazard area.

The named petitioners are ten individuals and the trustee an Illinois land trust. Basing the District Court's jurisdiction upon 28 U.S.C. Section 1331, petitioners filed a complaint on their own behalf and on behalf of a similarly situated class of persons against 27 banks and savings and loan associations. Six of the respondents made mortgage loans to the named petitioners; 21 of the respondents made mortgage loans to members of the petitioner class.

Each petitioner purchased property located in an area identified by the Department of Housing and Urban Development or the Federal Emergency Management Agency as being prone to flooding. The complaint alleges that each respondent failed to notify their borrower of the flood hazard designation and that insurance was available, in violation of 42 U.S.C. Section 4104a, and failed to require the purchase of flood insurance, in violation of 42 U.S.C. Section 4012a(b). Each petitioner consummated a loan transaction with a respondent and acquired flood-prone property ignorant of the risk and without protection against the financial consequences of flooding. Thereafter, each petitioner sustained flood damage which was not covered by insurance.

Count I of the complaint seeks recovery for the uninsured flood loss resulting from each respondents' failure to discharge their duties under Sections 4104a and 4012a(b). Counts II and III state claims for relief for common law negligence and violation of the Illinois Fraud and Deceptive Trade Practices Act (*Ill. Rev. Stat.* ch. 121½, Section 261 *et seq.*), respectively. On March 30, 1982, the District Court granted the respondents' motions to dismiss, finding that a cause of action

is not to be implied in favor of petitioners. The pendent state claims set forth in Counts II and III were dismissed for lack of federal jurisdiction. While the proceeding was pending in the Court of Appeals, petitioners commenced an action in the Circuit Court of Cook County, Illinois asserting the claims set forth in Counts II and III. That action has been stayed pending disposition of these proceedings.

On June 15, 1984, the Court of Appeals affirmed the dismissal of the complaint on the ground that no federal cause of action may be implied under 42 U.S.C. Section 4012a(b) or 4104a.

Reasons For Granting The Writ

1. The Analysis Of The Court Below Conflicts With The Analysis Of Other Courts Of Appeals As To Whether A Cause of Action Is To Be Implied Under 42 U.S.C. Section 4012a(b) or 4104a.

In 1975, this Court articulated definitive standards and a mode of analyzing whether a cause of action is to be implied from a statutory scheme which does not contain a provision granting the plaintiff the right to sue. *Cort* v. *Ash,* 422 U.S. 66 (1975). Since 1975, this Court has modified the approach, holding that all of the *Cort* standards need not be applied in each case and that the standards are not of equal weight. *Touche Ross & Co.* v. *Redington,* 442 U.S. 560 (1979).

The court below limited its analysis of whether a cause of action is to be implied to a search for indications that Congress intended that federal cause of action. Finding no such indications of intent to create a damages remedy, the court below, following this Court's ". . . reluctance in recent years to imply new causes of action in the absence of supportive legislative intent" (737 F. 2d at 643), affirmed the dismissal of the complaint. In its opinion, the Seventh Circuit cited six decisions which have held that no private federal damages remedy is to be implied under either 42 U.S.C. Section 4012a(b) or 4104a. However, in the main, these decisions, commencing with the Fifth Circuit decision in *Till* v. *Unifirst Federal Savings and Loan Association,* 653 F. 2d 152 (5th Cir. 1981), analyzed the question under the four-part *Cort* approach. And, in so doing, the Fifth Circuit misapplied the test in several crucial respects.

This Court should review the judgment below to restate the proper manner of analyzing whether a remedy exists by implication. Upon making such restatement, the Court should find a remedy in favor of petitioners and against respondents.

The analysis of the court below should be rejected by this Court. An analysis limited to a passive search for objective, express indicia of legislative intent to create a cause of action appears tantamount to signalling the demise of the doctrine of implied judicial remedies. In this regard, it must be kept in mind that this doctrine begins with the premise that Congress enacted legislation affording federal rights to a certain group but without affording that group an express method of enforcing those rights in private federal civil litigation. In that circumstance, under the approach of the court below, may a remedy be sustained in any circumstance other than one in which it may be said that Congress intended to include a provision authorizing a private remedy but simply forgot to do so? The doctrine of implied remedies should not become a matter of judicial history because it serves an important role in the administration of justice. The doctrine allows the courts to recognize and, where necessary, fashion an appropriate remedy to vindicate federally created rights and accomplish the legislative purpose.

The implication analysis which is limited to a search for indications of legislative intent to create a remedy is inadvisable for at least three reasons.

First, the approach appears to sanction a virtual disregard of the previously pivotal issue of whether Congress created federal rights in or enacted a statute for

the especial benefit of a group which includes the plaintiff in the case. Prior to *Cort,* the implied rights analysis focused upon legislative intent. The key issue was whether Congress enacted a statute for the benefit of, or created rights in, a definable class. A right to recover damages was implied where damages resulted to a member of the group for whose benefit a statute was enacted by reason of the violation of the statute. *Texas & Pacific R. Co.* v. *Rigsby,* 241 U.S. 33 (1916); and *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran,* 456 U.S. 353 (1982).

Under *Cort,* the first and often dispositive issue was whether the statute was enacted for the "especial benefit" of a class which included the plaintiff in the case. Whether a statute was enacted for the especial benefit of a class turned upon the particular language used by Congress, whether general proscriptive language or language which expressly identified the class upon which Congress intended to confer a benefit. *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979).

The especial benefit concept should be retained as a significant element in the implied rights analysis. In the present case, the language used by Congress expressly identifies a class which includes the petitioners. Section 4104a requires lenders, ". . . to notify the purchasers . . . of such special flood hazards. . . ." Moreover, the statute create rights in borrowers: the right to be given advance written notice of a specific risk that the property they are about to acquire is likely to sustain flood damage. The statute also impresses an obligation upon lenders which runs directly in favor of a class which includes the petitioners herein.

The decision of the Fifth Circuit, *Till,* imposed an additional requirement upon flood victims seeking to sustain a right of action by implication. The court required the plaintiff to show that the statute was enacted for the *sole* benefit of the class of which he is a member. A finding that Congress intended to confer a benefit, even collaterally, upon other groups was considered evidence of congressional intent to deny a private damages remedy to the plaintiff. This equation of "especial benefit" with "sole benefit" appears to be without foundation in the law and unique to flood insurance litigation. Petitioners are within the class for whose especial benefit Section 4012a(b) was enacted, and are within the class for whose sole benefit Section 4104a was enacted. However, the Seventh Circuit has held that the especial benefit test is no longer dispositive. *Bassler* v. *Central National Bank in Chicago,* 715 F. 2d 308 (7th Cir. 1983). The court below made only cursory reference to this concept, in connection with its discussion of the general purposes of the flood insurance program. 737 F. 2d at 642-43.

This Court should reaffirm the significance of the especial benefit analysis and affirm that one may be the especial beneficiary of a law without being a member of the only group benefited by the law.

Second, the approach of the court below misstates the consequences of the fact that the entire body of flood insurance legislation contains two provisions which deal with the subject of lawsuits. The court below concluded that the existence of Section 4053, which deals with federal court jurisdiction over suits against flood insurers and Section 4104(f), permitting appeals by communities from flood zone designations, indicates an

intent to deny petitioners a private remedy. Citing *Touche Ross,* 442 U.S. at 572, the court below found that, "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." 737 F. 2d at 642.

To hold that the existence of a single provision in an act addressing lawsuits indicates intent to exclude additional remedies, without regard to whether the section is related to the particular provision in issue, and without regard as to whether there is any indication that Congress intended the express provision to be exclusive, would drastically limit those cases in which an implied rights argument might be maintained. This Court has indicated that it is appropriate to focus the analysis upon the particular provision in issue and not upon the entire piece of legislation in analyzing whether or not to imply a cause of action. *Cannon,* 44 U.S. at 711. In *Herman & MacLean* v. *Huddleston,* 459 U.S. 375 (1983), this Court held that the existence of an express remedy in a statute does not preclude implication of a private remedy as well.

Third, the court below fails to take into account the contemporary context in which Sections 4012a(b) and 4104a were enacted. Both sections predate both *Cort* and those opinions issued subsequent to 1975 restricting the circumstances in which a cause of action may be implied. Therefore, in construing legislative intent, it is appropriate to consider the state of the doctrine of implied remedies in effect when Congress acted. *Cannon,* 441 U.S. at 698-99; *Merrill Lynch,* 456 U.S. at 378.

2. The Decision Below Raises Significant And Recurring Problems Of Nationwide Scope Concerning The Federal Flood Insurance Laws.

The significance of this case in terms of the doctrine of implied rights of action has been highlighted above. The significance of this case in terms of the specific context in which it arises is set forth below. At least three factors render this case particularly important.

First, there is a significant number of borrowers located across the United States who are, apparently, in the same position as petitioners herein. The existence of lawsuits in Minnesota, North Dakota, South Carolina, Mississippi and California raising the identical issue which arose herein in Illinois suggests a problem of major proportions. Moreover, the problem will recur as long as persons purchase flood-prone properties without the notice and insurance protection mandated by Congress. An end to this problem may be realized if lenders are held accountable for the consequences of their failure to perform the mandatory duties imposed upon them by law. Such accountability - responsibility in damages - will provide lenders with a meaningful incentive to comply with the law.

Second, the decision below subjects the victims of uninsured flood loss to the vagaries of state tort law. After finding no federal cause of action, the court in *Till* and the court in *Hofbauer* v. *Northwestern National Bank of Rochester, Minnesota*, 700 F. 2d 1197 (8th Cir. 1983) remanded the cases to Mississippi and Minnesota state courts, respectively, to adjudicate whether the lenders' conduct forms the basis for a cause of action under state negligence laws. However, whether a homeowner who purchases a home without knowledge that it is

located in a federally designated flood hazard area, and who suffers flood loss without federally required insurance protection should have a remedy should not depend upon the state in which the homeowner resides. Instead, the homeowner's rights should be decided uniformly, as a matter of federal law. That the flood insurance legislation creates new rights and imposes new duties with no prior state law counterpart renders uniform adjudication particularly appropriate. *Tunstall* v. *Brotherhood of Locomotive Firemen,* 323 U.S. 210 (1944).

Third, the decision below cripples the flood insurance program. At least one of Congress' objectives in enacting the flood insurance laws was to make flood insurance available and to make its purchase mandatory in certain circumstances. When federally regulated banks and savings and loan associations fail to discharge their duty under Sections 4012a(b) and 4104a, persons buy and build in flood hazard areas without notice of the risks and without insurance protection. When flood damage occurs, the property owner is harmed, the lender may be harmed to the extent that the value of the security for its loan remains impaired, and the federal government is harmed if it makes disaster assistance loans to flood victims. Implying a remedy is vital to achieve the congressional purpose.

Affording petitioners a remedy is also consistent with whatever administrative enforcement machinery may be available to police the law. A private remedy may exist as a supplement to the administrative procedures. *Merrill Lynch,* 456 U.S. at 378. Moreover, there is no procedure by which a flood victim may either initiate or intervene in any administrative enforcement proceedings,

and there is a substantial question as to whether the federal regulators have the power to take any steps to enforce compliance with Sections 4012a(b) and 4104a other than prospectively. *Gulf Federal Savings* v. *Federal Home Loan Bank Board,* 651 F. 2d 259 (5th Cir. 1981).

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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NOVEMBER 12, 1984

APPENDIX

Opinion by Judge Cummings

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

June 15, 1984

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. WILLIAM L. BEATTY, *District Judge**

No. 83-1716

MID-AMERICA NATIONAL BANK OF CHICAGO, not personally but as Trustee pursuant to a Trust Agreement dated May 1, 1981, and known as Trust Number 1575, et al.,

Plaintiffs-Appellants,

v.

FIRST SAVINGS AND LOAN ASSOCIATION OF SOUTH HOLLAND, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 82-C-3386

JOHN A. NORDBERG, *Judge*.

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* The Honorable William L. Beatty, United States District Judge for the Southern District of Illinois, is sitting by designation.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 83-1716

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No. 82-C-3386

JOHN A. NORDBERG, *Judge.*

ARGUED FEBRUARY 17, 1984 — DECIDED JUNE 15, 1984

Before CUMMINGS, *Chief Judge,* COFFEY, *Circuit Judge,* and BEATTY, *District Judge.**

CUMMINGS, *Chief Judge.* This appeal presents the issue of whether an implied right of action exists in favor of borrowers against lenders under the National Flood Insurance Program (the "Flood Program"), 42 U.S.C. §§ 4012a(b) and 4104a. The district court granted defendants' motion to dismiss, holding that no such implied right of action exists under Sections 4012a(b) and 4104a, and we affirm.

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* The Honorable William L. Beatty, United States District Judge for the Southern District of Illinois, is sitting by designation.

I

The named plaintiffs are ten individuals, being five husbands and wives, and the trustee of an Illinois land trust. Plaintiffs brought this action on their own behalf and on behalf of an alleged class against 27 federally chartered or insured commercial banks and savings and loan associations. Six of the defendant institutions extended mortgage loans to the named plaintiffs for the purchase of properties located in the southern Chicago metropolitan area. The remaining 21 defendants are alleged to have loaned money to a member of the plaintiff class in a situation similar to that of the named plaintiffs.

The named plaintiffs assert that the mortgaged property securing their loans is located in an area identified by the Department of Housing and Urban Development (HUD) or the Federal Emergency Management Agency (FEMA) as being prone to flooding. Plaintiffs claim that defendants violated 42 U.S.C. § 4104a by failing to notify plaintiffs of the flood risk when plaintiffs acquired their loans, and that defendants violated 42 U.S.C. § 4012a(b) by failing to require plaintiffs to purchase flood insurance to the extent of the loan amounts. Plaintiffs' property suffered flood damage, and plaintiffs assert their losses were uninsured. Although the above provisions do not expressly create a federal cause of action in favor of borrowers against mortgage lenders, plaintiffs seek to hold defendants liable for the losses and claim that an implied private right of action exists under Sections 4012a(b) and 4104a of the Flood Program.

Count I of plaintiffs' complaint alleges the above-mentioned federal cause of action. Counts II and III assert that defendants' actions violated state common law and the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat., ch. 121½, §§ 261-272.

Defendants brought a motion to dismiss, accepting plaintiffs' factual allegations as true in order to reach

the dispositive legal issue. The district court granted defendants' motion, holding that no implied right of action exists under the Flood Program which would allow borrowers to sue their mortgage lenders. Since no independent basis for federal jurisdiction remained, the district court dismissed the pendent state claims without prejudice.[1] Plaintiffs appeal from the district court's memorandum opinion and order granting defendants' motion to dismiss.

II

In 1975 the Supreme Court in *Cort* v. *Ash*, 422 U.S. 66, set out a four-factor analysis by which to determine whether an implied right of action exists under a statute: (1) whether the plaintiff is a member of the class for whose "especial benefit" the statute was passed; (2) whether there is any indication of legislative intent, explicit or implicit, either to create a private right of action or to deny one; (3) whether a private right is consistent with the underlying purposes of the legislative scheme; and (4) whether the claim is one traditionally assigned to state law so that it would be inappropriate to infer a claim based on federal law. *Cort* v. *Ash*, 422 U.S. at 78.

The approach taken in Supreme Court decisions subsequent to *Cort* indicates that the determination whether an implied right of action exists under a statute need not be broken down into four purportedly separate factors. In these more recent cases the Supreme Court has focused on a comprehensive analysis of legislative intent instead of explicitly following the point-by-point *Cort* analysis. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 23-24; *Touche Ross & Co.* v. *Redington*, 442

[1] Subsequent to the issuance of the district court's memorandum opinion and order granting defendants' motion to dismiss, plaintiffs commenced a class action in state court, raising essentially the same state law claims that were alleged in this case.

U.S. 560, 568. Indeed the first and third *Cort* factors are intimately related to the question of legislative intent. *Touche Ross & Co.* v. *Redington,* 442 U.S. at 575-576. Pursuant to this development the second *Cort* factor—legislative intent—is the crucial issue, to be resolved in light of the statutory language, legislative history, and legislative purpose. *Universities Research Association* v. *Coutu,* 450 U.S. 754, 770; *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. at 23-24; *Touche Ross & Co.* v. *Redington,* 442 U.S. at 575-576; *Bassler* v. *Central National Bank,* 715 F.2d 308, 310 (7th Cir. 1983); *Indiana National Corp.* v. *Rich,* 712 F.2d 1180, 1185 (7th Cir. 1983).

With this mode of analysis we now turn to the substantive issue in this case. The Fourth, Fifth, and Eighth Circuits have considered the precise issue before us and have held that no implied private right of action exists under Sections 4012a(b) and 4104a. *Hofbauer* v. *Northwest National Bank of Rochester,* 700 F.2d 1197 (8th Cir. 1983); *Arvai* v. *First Federal Savings & Loan Association,* 698 F.2d 683 (4th Cir. 1983); *Till* v. *Unifirst Federal Savings & Loan Association,* 653 F.2d 152 (5th Cir. 1981). Accord *Brill* v. *Northern California Savings & Loan Association,* 555 F. Supp. 566 (N.D. Cal. 1982) (Peckham, C.J.). Two state courts have reached the same result. *R.B.J. Apartments, Inc.* v. *Gate City Savings & Loan Association,* 315 N.W.2d 284 (N.D. 1982); *Pippin* v. *Burkhalter,* 279 S.E. 2d 603 (S.C. 1981). Plaintiffs do not cite nor does our research disclose any reported decision not overruled that reaches a contrary result.[2] Upon an analysis of the stat-

[2] Two unpublished decisions have held that an implied private right exists in favor of borrowers against mortgage lenders under Section 4012a(b) and 4104a. *Adlesperger* v. *Eureka Federal Savings & Loan Association,* No. 79-1360 (D. Kan. Feb. 4, 1981); *Fromdahl* v. *Century-21 Real Estate Center,* No. 41899 (Minn. Dist. Ct., 3d Jud. Dist., June 19, 1980). On September 22, 1981, *Adlesperger* was dismissed on motion of the parties, suggesting that the parties had reached a settlement on the damage issue.

utory language, legislative history, and legislative purpose, this Court concludes similarly that no implied private right of action exists under Sections 4012a(b) and 4104a of the Flood Program.

The enactment initiating the Flood Program is the National Flood Insurance Act of 1968. The 1968 Act created a nationwide program to encourage the adoption by local communities of sound land use practices designed to reduce or avoid damage from flooding, and to encourage the purchase of flood insurance in designated flood hazard areas. Congress set forth the factors that formed the basis of the 1968 Act:

> (a) The Congress finds that (1) from time to time flood disasters have created personal hardships and economic distress which have required unforeseen disaster relief measures and have placed an increasing burden on the Nation's resources; (2) despite the installation of preventive and protective works and the adoption of other public programs designed to reduce losses caused by flood damage, these methods have not been sufficient to protect adequately against growing exposure to future flood losses; (3) as a matter of national policy, a reasonable method of sharing the risk of flood losses is through a program of flood insurance which can complement and encourage preventive and protective measures; and (4) if such a program is initiated and carried out gradually, it can be expanded as knowledge is gained and experience is appraised, thus eventually making flood insurance coverage available on reasonable terms and conditions to persons who have need for such protection.

42 U.S.C. § 4001(a). As a condition of eligibility for government-subsidized flood insurance, the 1968 Act required HUD-designated flood-prone communities to adopt local flood plain management policies to diminish potential flood damage. 42 U.S.C. §§ 4022, 4102.

The availability of government subsidized flood insurance did not, however, provide adequate incentive to attract extensive local community participation in the Flood Program.[3] Accordingly, Congress promulgated the Flood Disaster Protection Act of 1973, which is combined with the 1968 Act at 42 U.S.C.§§ 4001 *et seq.* Section 4106 of the 1973 Act as originally enacted, required participation for the flood-prone community to be eligible for federal financial aid for general construction or acquisition purposes[4] as well as for financing by federally supervised private lending institutions.[5] The latter restriction was eliminated by Section 703(a) of the Housing and Community Development Act of 1977[6] and as amended is now a notice requirement mandating that the federal agencies[7] which supervise the mortgage lenders require the lenders to inform borrowers whether or not their properties would be eligible for federal disaster relief assistance in the event of a flood. 42 U.S.C. § 4106(b).

The particular provisions upon which plaintiffs base their claim are 42 U.S.C. §§ 4012a(b) and 4104a. Section 4012a(b), found at Section 102 of the 1973 Act, requires that:

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[3] See S. Rep. No. 93-583, 93d Cong., 1st Sess. 4, reprinted in [1973] U.S. Code Cong. & Ad. News 3217, 3220.

[4] Section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. § 4106(a).

[5] Section 202(b) of the Flood Disaster Protection Act of 1973, 42 U.S.C. § 4106(b), before amendment by the Housing and Community Development Act of 1977, Pub. L. No. 95-128, 91 Stat. 1111.

[6] Pub. L. No. 95-128, § 703(a), 91 Stat. 1144 (codified at 42 U.S.C. § 4106(b), as amended).

[7] These agencies include the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Federal Home Loan Bank Board, the Federal Savings and Loan Insurance Corporation, and the National Credit Union Administration. See 42 U.S.C. § 4003.

> Each Federal instrumentality responsible for the supervision, approval, regulation, or insuring of banks, savings and loan associations or similar institutions shall by regulation direct such institutions not to * * * extend any loan secured by * * * real estate * * * in an area that has been identified by the Secretary [of HUD] as an area having special flood hazards * * * unless the building * * * and any personal property securing such loan is covered for the term of the loan by flood insurance in an amount at least equal to the outstanding principal balance of the loan * * *.

The regulations implementing this requirement are codified in 12 C.R.F. §22, issued by the Comptroller of the Currency (regarding banks), and 12 C.F.R. § 523.29(b), issued by the Federal Home Loan Bank Board (regarding savings and loan associations).

Section 4104a, enacted in 1978,[*] empowers the federal supervisory agencies to require by regulation that the lending institutions notify borrowers a reasonable period

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[*] Section 4104a provides:

> Each Federal instrumentality responsible for the supervision, approval, regulation, or insuring of banks, savings and loan associations, or similar institutions shall by regulation require such institutions, as a condition of making, increasing, extending or renewing (after the expiration of thirty days following August 22, 1974) any loan secured by improved real estate or a mobile home located or to be located in an area that has been identified by the Secretary under this chapter or Public Law 93-234 as an area having special flood hazards, to notify the purchaser or lessee (or obtain satisfactory assurances that the seller or lessor has notified the purchaser or lessee) of such special flood hazards, in writing, a reasonable period in advance of the signing of the purchase agreement, lease, or other documents involved in the transaction.

in advance of closing that the property is located in a HUD-designated flood zone. 12 C.F.R. §§ 22.6 and 523.29(e) require the notification pursuant to 42 U.S.C. § 4104a, specifying that notice be given at least ten days prior to closing.

Neither Section 4012a(b) nor Section 4104a expressly creates a federal cause of action in favor of borrowers against mortgage lenders where the lenders do not direct borrowers to purchase flood insurance in the amount of the loan or where lenders do not notify borrowers of the HUD flood-risk area designation. Our analysis of these provisions as well as the entire statutory scheme of the Flood Program reveals no indicia of legislative intent to create an implied federal cause of action under Sections 4012a(b) or 4104a.

It is clear from the plain language of Sections 4012a(b) and 4104a that Congress specifically placed the responsibility of administering and enforcing those aspects of the Flood Program dealing with mortgage lenders with those federal agencies which supervise the lenders, *viz.*, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Federal Home Loan Bank Board, the Federal Savings and Loan Insurance Corporation, and the National Credit Union Administration. See 42 U.S.C. § 4003. In addition, Congress expressly conveyed to the Comptroller of the Currency the authority to issue cease-and-desist orders against bank officers to terminate unsound practices, 42 U.S.C. § 1818(b)(1), and the power to impose penalties for a national bank's failure to make required reports, 12 U.S.C. § 161. Regarding federally-insured savings and loan associations, the Federal Home Loan Bank Board possesses the authority to issue cease-and-desist orders against savings and loan officers, 12 U.S.C. § 1464(d)(2)(A), to terminate unsafe or unsound practices, 12 U.S.C. § 1464(d)(4), to impose administrative remedies, including monetary penalties, 12 U.S.C. § 1464(d)(8)(B), and to mandate affirmative action to cor-

rect such violations, 12 U.S.C. § 1464(d)(2)(A). It is manifest that the existence of supervisory and enforcement authority at the administrative level suggests that broad private remedies were not intended. *Transamerica Mortgage Advisors, Ins.* v. *Lewis*, 444 U.S. 11, 20; *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458.

Where Congress apparently intended a private cause of action in connection with the Flood Program it explicitly provided for a carefully tailored one. 42 U.S.C. §§ 4053 and 4072 provide that flood insurance policyholders may sue their insurers in federal court in regard to disputes arising from the policies. And under 42 U.S.C. § 4104(f), owners, lessees, and communities objecting to a HUD flood-hazard designation are given a federal cause of action in order to seek redesignation. The reasoning in *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572, is therefore pertinent wherein the Supreme Court stated "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly."

Further, an analysis of the legislative history and purpose indicates that the primary purpose behind the Flood Program was to diminish, by implementation of sound land use practices and flood insurance, the massive burden on the federal treasury of escalating federal flood disaster assistance.* Federally supervised mortgage len-

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*House Report No. 1585 addressed the purpose and objectives of the Flood Program:

> Heavy losses over the years from hurricanes in the coastal areas and from storms in inland areas of the Nation dramatize the lack of insurance protection against flood damage. Insurance protection against the risk of destruction caused by tornadoes and other natural catastrophes is generally available, but it is not available against the risk of flood loss.
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> Communities along the seacoast or in a river basin become completely immobilized following a major flood. Usually they must depend on the Federal Gov-

ders also benefit, especially from the requirement of Section 4012a(b) that borrowers purchase flood insurance in the amount of the loan. It is obvious that Congress also intended borrowers to benefit from both Section 4012a(b) and the notice provision of Section 4104a, but the Flood Program is primarily concerned with protecting the federally supervised and insured lenders since the flood insurance purchase requirement of Section 4012a(b) extends only to the amount of the outstanding loan balance and not to the borrower's equity. Accord *Hofbauer v. Northwestern National Bank of Rochester*, 700 F.2d 1197, 1200 (8th Cir. 1983); *Till v. Unifirst Federal Savings & Loan Association*, 653 F.2d 152, 159 (5th Cir. 1981).

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[9] (Continued)

> ernment and voluntary relief agencies to provide various forms of assistance. Some State and local governments have limited programs to assist a flood stricken area, but disaster relief from all of these sources is inadequate to provide for the necessary restoration of heavily damaged areas. These facts underline the need for a program which will make insurance against flood damage available, encourage persons to become aware of the risk of occupying the flood plains, and *reduce the mounting Federal expenditures for disaster relief assistance.* (emphasis added)

H.R. Rep. No. 1585, 90th Cong., 2d Sess., reprinted in [1968] U.S. Code Cong. & Ad. News 2873, 2966-2967, quoted in *Till v. Unifirst Federal Savings & Loan Association*, 653 F.2d 152, 159 n.14 (5th Cir. 1981). For further evidence of the congressional concern over the strain on the federal fisc due to flood damage, see S. Rep. No. 93-583, 93d Cong., 1st Sess., reprinted in [1973] U.S. Code Cong. & Ad. News 3217, 3218-3220, 3223.

Absent any indication that Congress intended a federal cause of action in favor of borrowers against lenders under Sections 4012a(b) and 4104a, this Court is not in a position to create such a cause of action. This result is congruous with the Supreme Court's reluctance in recent years to imply new causes of action in the absence of supportive legislative intent. See *Universities Research Association v. Coutu,* 454 U.S. 754; *Middlesex County Sewerage Authority v. National Sea Clammers Association,* 453 U.S. 1; *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630; *California* v. *Sierra Club,* 451 U.S. 287; *Northwest Airlines, Inc.* v. *Transport Workers Union of America,* 451 U.S. 77. We need not produce further analysis herein, for decisions cited *supra* of other federal courts addressing this precise question adequately canvass the issues.

We therefore affirm the district court's dismissal of this action.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MID-AMERICA NATIONAL BANK OF CHICAGO, not personally but as Trustee pursuant to a Trust Agreement dated May 1, 1981 and known as Trust Number 1575, et al.,

Plaintiffs,

vs.

FIRST SAVINGS AND LOAN ASSOCIATION OF SOUTH HOLLAND, et al.,

Defendants.

No. 82 C 3386

JOHN A. NORDBERG, District Judge

MEMORANDUM OPINION AND ORDER

Plaintiffs filed this suit as a class action against twenty-seven banks and savings and loan associations seeking recovery for flood damage to the homes of class members. In Count I of the complaint, plaintiffs claim that defendants violated sections 4012a and 4104a of the National Flood Insurance Act, 42 U.S.C. §4012a, 4104a ("Act"). Specifically, plaintiffs allege that defendants failed to notify borrowers that their property was located in flood hazard areas in violation of §4104a, and failed to require the purchase of flood insurance before extending loans for the purchase of homes in violation of §4102a.[1]

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[1] Section 4012a of the Act provides that certain federal agencies charged with supervising lending institutions shall establish regulations prohibiting those lending institutions from extending loans secured by property located in specially designated "flood hazard" zones, unless the property secured is covered by flood insurance at least in the amount of the outstanding principle [sic] balance of

[sic] Count II contains a state tort claim, alleging that the defendants breached their statutory duties to the plaintiffs under the Act. In Count III, plaintiffs allege that the same failures of the defendants constitute a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121 ½, par. 261 *et seq.*

All defendants have moved to dismiss the entire action, primarily on the ground that no implied cause of action exists in favor of the plaintiffs under the National Flood Insurance Act. The Act does not explicitly create a private cause of action for homeowners under sections 4012a or 4104a. The Court must therefore determine whether a private right of action may be implied under these provisions.

The Fifth Circuit Court of Appeals has decided this precise issue in a well-reasoned opinion in *Till* v. *Unifirst Federal Savings & Loan Association,* 653 F.2d 152 (5th Cir. 1981), in which the Court concluded that no private cause of action exists in favor of individual home owners. The same conclusion was recently reached in *Hofbauer* v. *Northwestern National Bank of Rochester,* Nos. 82-1522, 82-1570 (8th Cir., March 2, 1983), and *Avrai* [sic] v. *First Federal Savings and Loan Association,* No. 82-1394 (4th Cir., January 20, 1983). Without repeating herein the bases for those decisions, this Court concurs in and adopts in full the reasoning of all three courts, and therefore concludes that no private cause of action exists in favor of plaintiffs in this action under sections 4012a and 4104a of the Act. Defendants' motions to dismiss Count I is therefore granted.

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[1] (Continued)
the loan. Section 4104a directs those same federal agencies to establish regulations requiring the lending institutions to notify affected borrowers that their property is located in a flood hazard zone, and to inform them that flood insurance is available to them under the Act.

Counts II and III allege causes of action under state law which have no independent basis for federal jurisdiction. In light of the Court's dismissal of Count I above, Count II and III must also be dismissed without prejudice for lack of federal jurisdiction. *United Mine Workers of Amcrica* v. *Gibbs,* 383 U.S. 715 (1966).

Accordingly, defendants' motions to dismiss all three counts of plaintiffs' complaint are granted.

/s/ John A. Nordberg
John A. Nordberg, District Judge

Dated: March 30, 1983

42 U.S.C. Section 4012a(b):

Each Federal instrumentality responsible for the supervision, approval, regulation, or insuring of banks, savings and loan associations, or similar institutions shall by regulation direct such institutions not to make, increase, extend, or renew after the expiration of sixty days following December 31, 1973, any loan secured by improved real estate or a mobile home located or to be located in an area that has been identified by the Secretary as an area having special flood hazards and in which flood insurance has been made available under this chapter, unless the building or mobile home and any personal property securing such loan is covered for the term of the loan by flood insurance in an amount at least equal to the outstanding principal balance of the loan or to the maximum limit of coverage made available with respect to the particular type of property under the chapter, whichever is less.

42 U.S.C. Section 4104a:

Each Federal instrumentality responsible for the supervision, approval, regulation, or insuring of banks, savings and loan associations, or similar institutions shall by regulation require such institutions, as a condition of making, increasing, extending, or renewing (after the expiration of thirty days following August 22, 1974) any loan secured by improved real estate or a mobile home located or to be located in an area that has been identified by the Secretary under this chapter or Public Law 93-234 as an area having special flood hazards, to notify the purchaser or lessee (or obtain satisfactory assurances that the seller or lessor has notified the purchaser or lessee) of such special flood hazards, in writing, a reasonable period in advance of the signing of the purchase agreement, lease, or other documents involved in the transaction.